Bonita Nurseries, Inc. and Hansen Brothers, Incorporated, Joint Employers *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 741, AFL–CIO. Case 28–CA–13906

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 19, 1998, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel, joined by the Charging Party, filed exceptions and a supporting brief. The Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Liza Walker-McBride, Esq., for the General Counsel.
William P. Allen and *Gerard Morales, Esq.,* of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Tucson, Arizona, on June 24, 25, and 26, 1997,[1] pursuant to a complaint issued by the Regional Director for Region 28 of the National Labor Relations Board on December 31, and which is based on a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 741, AFL–CIO (Union) on September 13. The complaint alleges that Bonita Nurseries, Inc. and Hansen Brothers, Incorporated (Respondents) have engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The principal issues are: (1) Whether Respondents are joint employers; and (2) Whether Respondent Bonita made offers of employment to Gilbert Barios, Mark Gallego, Allen Slatzer, Jay Casey, Philo Nichols, and Benjamin Witt, and subsequently withdrew the offers because the offerees joined, supported, and assisted the Union, or engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondent Bonita Nurseries, Inc. admits that it is a Delaware corporation engaged in the production and wholesale distribution of tomatoes and that it has an office and place of business located in Wilcox, Arizona. Respondent Bonita Nurseries, Inc. further admits that during the 12-month period ending September 13, in the course and conduct of its business operations described above, it has sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Arizona. Accordingly, it admits and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent Hansen Brothers, Incorporated admits that it has been engaged in the construction business since 1974 and that it has an office and place of business located in Wilcox, Arizona. Respondent Hansen stipulated at hearing (Tr. 12), and I find that for all times material to this case, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondents admits at hearing, and I find, that United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 741, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Overview

Sometime before 1992, a process was developed for growing tomatoes in a liquid solution (hydroponic). Under the right conditions, and with a properly constructed greenhouse, the process could be extremely profitable. Apparently climate conditions in southeastern Arizona near Tucson are ideal, because in 1992, Respondent Bonita Nurseries, Inc. (Bonita) began construction of the first greenhouse consisting of 10 acres under roof (phase 1). The results were so successful that in 1994 an additional 10-acre greenhouse was added to the first

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find unpersuasive the Acting General Counsel's contention, in which the Charging Party joins, that a violation has been established here even if the Respondents are not found to be joint employers. We note that this contention is contrary to the allegations of the complaint and to the position taken by the Acting General Counsel at the hearing. We agree with the judge's finding that the Respondents are not joint employers, and we therefore dismiss the complaint on that basis. We find it unnecessary to pass on the judge's alternative basis for dismissing the complaint.

[1] All dates are in 1996 unless otherwise indicated.

(phase 2), and in 1996 a third 20-acre greenhouse was added (phase 3). The record contains an overhead photograph of the 40-acre structure (R. Exh. 4), which produces annually approximately 20 million pounds of beefsteak tomatoes.

The record is sparse regarding the identity of the builders of the original structure in 1992. It appears that Bonita, working in collaboration with a Dutch company called Dalsem-Kassenbouw (Dalsem), erected the greenhouse, using a local general contractor. Apparently because the Dutch either invented and/or refined the technology for the growing of tomatoes in liquid solution, they were considered the experts in the process. All or most of the supervisors in phase 1 were Dutch. Nonsupervisory labor included Dutch, Belgium, Mexican (possibly undocumented), and others. All nonsupervisory employees, foreign and local, shared a nonunion status. Employee classifications on phase 1 included irrigation system installers (other), pipefitters, heating/air-conditioning technicians, glaziers, metal assemblers/welders, cement masons, and laborers.

The use of nonunion employees, some of whom were nationals of a foreign country and some of whom may not have been legally working in the United States, angered local union officials who believed their members should have the jobs. One of these affected unions was the Charging Party, which represented many classifications used on the construction work of the greenhouse. For all times material to this case, Wayne Bryant was marketing representative for the Union. Bryant, a General Counsel witness, and another union official named Ross Hazlett were to play major roles in the instant case. By the time Bonita began phase 2 of the project, the Union was ready to battle for the jobs.

2. Phase 2

In 1994, either Dalsem or Bonita caused an ad to be placed in a local paper seeking experienced heating engineers and other classifications needed to work on phase 2. Bryant responded, but was told by an employer representative that it was too late for Americans to be hired on the project and that Bryant might be used on the next phase. Another person who responded was Philo Nichols, alleged discriminatee and the General Counsel witness. A member of the Union for over 25 years, Nichols applied for work as a pipefitter or heating engineer, but was not hired.

During the hiring process for the 1994 project, Bryant learned that Dalsem had applied for labor certifications (visas) for foreign labor. The application was denied by the U.S. Department of Labor, on the grounds that Dalsem submitted the application instead of Bonita, an American company, as required by regulation (G.C. Exh. 38). It is not clear what role, if any, the Union played in the denial of the application. It is clear, however, that after denial, the Union learned that certain foreign workers were employed on phase 2. Believing the foreign workers were there illegally, the Union made a complaint to the U.S. Department of Immigration and Naturalization Service (INS). Upon receiving this information, INS conducted a "raid" on the phase 2 jobsite where a number of undocumented workers were arrested. The record does not show the final disposition of the 1994 INS charges.

The Union also complained to the Arizona Registrar of Contractors, an agency responsible for enforcing the State's requirement that general contractors have proper licenses (and warranties of work and bonds) to perform construction work in that State. The General Counsel called a witness named Andy Ridgley, an investigator for the Arizona State Registrar of Contractors, a consumer protection agency. In 1994, Ridgley responded to the Union's complaint, and after investigation, determined that Bonita was acting as a general contractor, i.e., hiring subcontractors to perform work on the project and overseeing their work, without an Arizona general contractor's license. Bonita's president, Johan van den Berg, pled guilty to this charge and was fined approximately $750 plus court costs.

Notwithstanding all the above, phase 2 was ultimately completed and the result was so successful that phase 3 went into the planning stages in 1995. This time many of the issues glossed over in phases 1 and 2 would be joined for the instant case. The same confusion as to the identity of the general contractor, the role of foreign labor, and whether union labor was unlawfully kept off the project are all present.

3. Phase 3

a. With one exception, the General Counsel called all of Respondent's witnesses as adverse witnesses. Perhaps the most important adverse witness is Van den Berg, president of Bonita and 50 percent owner of the Company. He is also president of USVHP Greenhouse Management which controls the production processes in the greenhouse and played no role in the construction of the final 20-acre greenhouse.

Bonita began its preparation for phase 3 by following the same path it took in 1994. That is, it first entered into an agreement with Dalsem to construct the greenhouse by using Dutch, Belgium, and other foreign supervisory and nonsupervisory employees. This time a number of new parties were on the scene. First, on December 1, 1995, a European company named Hortitec, owned in whole or in part by Van Heynincen, Van den Berg's Bonita partner, entered into agreement with Bonita to supply the raw materials to erect the greenhouse (G.C. Exh. 11).

Bonita employs Nic Helderman as general manager and Jeane Wilmoth as controller, and both testified as adverse witnesses for the General Counsel. In addition, Darcy Renfro also testified as an adverse witness for the General Counsel. Renfro works as a senior associate for a Tucson business, Strategic Issues Management Group (SIMG). In May 1995, this company and Renfro in particular were retained by Bonita (G.C. Exh. 3), to assist in the application for visas for Dutch and Belgium employees to work on phase 3, allegedly as employees of Dalsem. These applications had to be funneled through a state agency and ultimately to the U.S. Department of Labor. As part of the process, local unions had to be given notice that Bonita was seeking, allegedly on behalf of Dalsem, visas for four classifications, irrigation-system installers, heating transfer technicians, glaziers, and metal assemblers (G.C. Exhs. 39(a)–(d). To be successful, the applicant was required to show that qualified and experienced local labor was not available to do the job.

For the Union, it was "deja vu all over again." They received notice of the new applications and initially took the position as before, that there was an abundance of local labor qualified and available, and the labor was registered as union members in good standing in the Union's hiring hall.

In fact, in late summer or early fall 1995, Bonita had caused ads to be placed in certain local publications seeking local persons with the skills sought in the visa applications. By now this procedure was familiar terrain as it had been done for phase 2. A number of persons responded to the ads, including five of the six alleged discriminatees (for unknown reasons Benjamin Witt did not testify). In addition to those union members who re-

sponded and were interviewed, in late October 1995, the Union gave Renfro and Helderman a list of other union members supposedly available for work (R. Exh. 9). This was apparently a list of all members in the Charging Party's Local, with phone numbers blocked out by Bryant, supposedly based on the requirements of some privacy law. When Renfro and Helderman complained that the list of names was worthless, a second shorter list was produced by the Union a few days later, this time with phone numbers available (R. Exh. 11). Renfro and Helderman attempted to contact the persons on the second list to invite them to submit applications, but they had little or no success, due either to disinterest or to inability to contact the person.

During the fall of 1995, a series of meetings was held between Renfro and Bryant and other union officials for the purpose of enlisting union officials into the campaign for approval of the visa applications. During one or more of these meetings, Bryant raised the possibility of Bonita signing a collective-bargaining agreement (project agreement) with the Union. Bryant furnished a draft to Renfro (G.C. Exh. 40). When the proposed agreement went nowhere (i.e., there is no credible evidence that Bonita ever seriously considered entering into a project agreement), Bryant even drafted a short form project agreement (G.C. Exh. 45) which met a similar fate.

If the project agreement had been accepted, there would have been no need for visas for foreign labor. However, Bryant held out a prospect of joining Bonita in an effort to obtain supervisors' visas in return for a project agreement. As the project agreement was not accepted, and the parties never negotiated over same, the Union not only refused to assist in Renfro's efforts to obtain visas, but actively opposed her efforts.

On December 5, 1995, Bonita's application for visas was denied by the Department of Labor (G.C. Exh. 8). An appeal to the Department of INS was similarly denied.

b. As a result of Bonita's inability to obtain visas, it supposedly considered for a time acting as general contractor for phase 3. This is what Bonita attempted to do in phase 2, but ended up pleading guilty to violations of applicable Arizona regulations and paying a fine. In 1996, as in 1994, Bonita lacked an Arizona general contractor's license and clearly could not be a general contractor in phase 3. Notwithstanding these facts, on March 18, Wilmoth sent a "Dear Andy" letter to Ridgley, the state investigator responsible for the 1994 plea of guilty, and asked a series of legal questions relative to the State of Arizona licensing laws for contractors (G.C. Exh. 14). Ridgley, apparently untroubled by the question of whether he was practicing law without a license, answered the question. Neither the questions nor the answers are particularly helpful in resolving the issues presented in this case. It suffices to say that Bonita concluded if it wanted phase 3 built, it was required to enter into a contract with a general contractor licensed by the State of Arizona.

c. The General Counsel called James Hansen as an adverse witness. Hansen, co-owner of Respondent Hansen Brothers, Incorporated (Hansen Bros.) testified that in the early 1990's, he suffered a work-related accident which caused him to be off work for 4 years. Just as his recuperation was ending, a person named Jim Martin who did accounting work for Hansen Bros. told him about the project in question in this case. By coincidence, Martin also did accounting work for Bonita, but he did not testify in this case. Martin, Van den Berg and Hansen all lived in or around Wilcox, Arizona. Hansen Bros. had performed some work on phase 2, but not as a general contractor. Apparently, its work was satisfactory, as Van den Berg selected Hansen Bros. over another contractor named Smith & Bell which had been the general contractor on phase 1.

Originally, phase 3 had been scheduled to begin in December, 1995, but when the visa applications and Bonita as a general contractor didn't work out, the project was pushed into the spring. On April 8, Bonita, Hansen Bros., and Hortitec as "Owner's Agent" entered into a contract for the building of phase 3 (G.C. Ex. 10). The contract specified (p. 2) that Hansen Bros. was to contract and coordinate with various owner appointed administrators who will provide technical expertise and supervision of the construction of the greenhouse and installation of the agricultural equipment. In addition, Hansen Bros. was authorized to contract as required, with subcontractors licensed by the State of Arizona. Hansen Bros. itself was fully licensed by the State of Arizona: Plumbing license (Feb. 10, 1995), a general building contractor's license (Feb. 10, 1995), and a general commercial contractor's license (April 8, 1996) (G.C. Exh. 48).

Before the work got underway in April, Hansen first hired Russell Tunks as job superintendent and working foreman. A statutory supervisor, Tunks was responsible for hiring all Hansen Bros. employees (about 19–20) and for supervising not only Hansen Bros. employees, but also the employees of various subcontractors on the job. He also was responsible for reporting work hours to Wilmoth so she could prepare the payroll. Tunks did not testify in the case.

As noted above, Hansen arranged with Wilmoth, Bonita's controller, to prepare the payroll for Hansen Bros. In addition, Wilmoth prepared Hansen Bros. quarterly tax returns, wrote checks on Hansen Bros. accounts in accord with instructions of Jim Hansen, made periodic payments to subcontractors and prepared and signed I–9 forms. According to Wilmoth, an I–9 is a U.S. Government form for each employee, that ensures that the employer is only hiring people who are legally entitled to work in the U.S. (Tr. 243). Wilmoth agreed to perform the work for Hansen Bros. because for some reason Martin could not. With the use of computer programs, and her own expertise, Wilmoth spent only 2–3 hours per week working on Hansen Bros.' matters, a job which she performed with the knowledge and permission of Van den Berg.

On some of the forms and reports which Wilmoth completed for Hansen Bros., she adopted the practice of placing after her name, "administrative assistant." Wilmoth credibly testified that she created the title on her own as she didn't know what title to use. I attach no particular significance to the use of this title, because to do so would elevate form over substance.

Some of the accounting work and check writing done for Hansen Bros. by Wilmoth related to certain subcontractors and suppliers. A detailed analysis of this evidence is not required. It suffices to say that Hansen Bros. received from Bonita $40,000 for its services plus costs. As permitted by its general contractors license, Hansen Bros. contracted with certain subcontractors to perform work on phase 3. Many or most of these subcontractors had performed work on phases 1 and 2 and it is possible that Bonita may have conveyed this information to Hansen Bros. According to Wilmoth, Bonita also entered into contracts with suppliers such as Cobre Building System, Terry Preas Welding and Avila Concrete. Among the Hansen Bros. subcontractors to which Wilmoth may have written checks on behalf of Hansen Bros. were Agro Welding, a heating contrac-

tor, controlled by Harry Bonsang who also lives in the Wilcox area and worked on phase 3, Wilcox Rock & Sand, a cement supplier, DuBois Excavating,[2] Mountain High Greenhouse Const., which provided certain glazier services, and Guardian Industries, a supplier of glass to the project, rather than a subcontractor. (As to Guardian, in some cases, it may also have dealt directly with Bonita.)

No representative of any administrator, subcontractor, or supplier testified, and the various business arrangements and practices described by Wilmoth are not in every instance crystal clear.

B. Analysis and Conclusions

1. Preliminary issues

In their answer (G.C. Exh. 2 (e), p. 3), Respondents have raised two affirmative defenses: "Estoppel" and "applicable statute of limitations." At hearing, counsel for Respondent elaborated on his theory of these affirmative defenses. As to the first, Respondent argues "equitable estoppel" in that the alleged discriminatees knew or should have known that there would be no job for them well before the construction began. As to the second affirmation defense, counsel contends the charge was filed December 13, 1996, which is well outside the statute of limitations (Tr. 9).

The burden of proving these affirmative defenses, or any affirmative defenses is on the party asserting them. *Sage Development Co.*, 301 NLRB 1173, 1189 fn. 37 (1991). In addressing these defenses, I have first searched Respondents' brief in vain for any factual or legal argument to support the affirmative defense. Because Respondents have not argued the points in the brief, I find these matters have been waived. Cf. *Food & Commercial Workers Local 137 v. Food Employers Council*, 827 F.2d 519 fn. 2 (9th Cir. 1987); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1025–1026 (7th Cir. 1988); and *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1988).

In any event, I also find that the defenses lack merit. In *All Shores Radio Co.*, 286 NLRB 394, 398 (1987), the Board expressed grave doubts as to whether the doctrine of equitable estoppel can be applied against the Government or one of its agencies. The Board also concluded on the merits that an attorney could not rely on a time extension to file an EAJA application, granted by the Board's Executive Secretary, where the Executive Secretary lacked authority to grant such extension. Assuming arguendo that equitable estoppel might apply to the NLRB, I find that the Respondents fall short because there was no privity between the Board and Respondents at the time the alleged discriminatees applied for employment. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 31 F.3d 355, 360 (3d Cir. 1995); *Konstantinidis v. Chen*, 626 F.2d 933, 936–937 (D.C. Cir. 1980). Finally, I find no evidence to show that when they applied for work the alleged discriminatees knew that so far as Bonita was concerned, there were no jobs for them. In fact, the opposite is true: they were offered jobs.

As to the statute of limitations defense, I first note that the charge was filed on September 13, not December 13. Moreover, the project did not begin until on or about April 8. Accordingly, the charge is well within the 6-month limitation period.

In light of the above, Respondents' affirmative defense are without merit.

2. Alleged joint employer status

The General Counsel urges that Bonita and Hansen Bros. are joint employers. In *NLRB v. Browning-Ferris*, 691 F.2d 1117, 1122–1123 (3d Cir. 1982), the court explained exactly what a joint employer is:

> two independent legal entities that have merely historically chosen to handle jointly . . . important aspects of their employer-employee relationship. In other words, one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. [Citations omitted].

In sum, the issue to be resolved in a case like the present case, is whether the employer exercises or has the right to exercise sufficient control over the labor relations policies of the contractor or over the wages, hours and working conditions of the contractor's employees from which it may be reasonably inferred that the employer is in fact an employer of the contractor's employees. *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

At page 24 of its brief, the General Counsel cites the case of *Holiday Inn of Benton*, 237 NLRB 1042, 1044 (1978), enfd. in part 617 F.2d 1264 (7th Cir. 1980). In *Holiday Inn*, the Board arranged its analysis of joint employer status into four principal factors: (1) interrelation of operations; (2) centralized control of labor relations; (3) common management, and (4) common ownership or financial control. In as much as these four factors are the very same mentioned by the Supreme Court in *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965), to determine "single employer" status, it appears that the court in *Browning-Ferris Industries*, supra, is correct when it speaks of a blurring of the "joint employer" and "single employer" concepts.[3] In fact, in *TLI, Inc.* and *Crown Zellerbach Corp.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 896 (3d Cir. 1985), the Board specifically adopted the appropriate standard set forth in *NLRB v. Browning-Ferris Industries*.

The General Counsel's case rises or falls on the role played by Wilmoth who performed certain payroll and accounting tasks for Hansen Bros. while she was a full-time employee of Bonita. In reviewing the scope of her activities for Hansen Bros., the time spent each week performing them and the fact that she received instead of wages from Hansen Bros., only a promise by Jim Hansen to perform work on her house in the future, I am convinced that the General Counsel's evidence falls short of establishing joint employer status. First, there is no evidence that Wilmoth had authority to hire, fire, discipline, responsibly direct or perform any other supervisory function with respect to the employees working on the project. While her unilateral use of the term "administrative assistant" on certain forms she completed for Hansen Bros., might raise questions, I credit Wilmoth's explanatory testimony that she used the term on her own, because she didn't know any other title to use. Moreover, suspicion cannot serve as a basis for finding discriminatory conduct on Respondents' part. *International Assoc. of Firefighters*, 297 NLRB 865, 872 (1990).

[2]. Apparently Hansen Bros. made an unsecured loan to DuBois prior to the time it commenced work on phase 3.

[3] See also *II Hardin, Developing Labor Law*, 1599 (3d ed. 1992), and *NLRB v. Western Temporary Services*, 821 F.2d 1258, 1266 (7th Cir. 1987).

While it is true that Bonita exercised some control over appointment of the administrators, administrators were not employees. Hansen Bros. exercised control over hiring and day-to-day work of employees, his own and many of the subcontractors. Jim Hansen delegated this job in particular to Tunks, his superintendent, who did not testify.[4] I have considered whether an adverse inference may be drawn and weighed against Respondents for not calling Tunks.[5] Since there is no evidence that Tunks currently works for Hansen Bros., it would be inappropriate to draw an adverse inference.[6] *NLRB v. Norbar, Inc.*, 752 F.2d 235, 240 (6th Cir. 1985); *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 fn. 1 (1991). Even if I were to draw an adverse inference, it would not assist General Counsel to overcome the lack of evidence in proving joint employer status. See *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995). Bonita has nothing to do with Tunks and it simply cannot be shown that Bonita meaningfully affected matters within the purview of Hansen Bros. relating to the employment relationship such as hiring, firing, discipline, supervision and direction." Id. at. 882. See also *Namer, Inc.*, 285 NLRB 521, 521–522 (1987).

In sum, I have considered the argument of the General Counsel in the context of this record and conclude, as did the Board in *TLI, Inc.*, that any control exercised by Bonita over the construction workers on phase 3 did not affect the terms and conditions of employment to such a degree that Bonita may be deemed a joint employer. I reach the same conclusion with respect to any control Bonita may have had over the economics of its relationship with Hansen Bros. Accordingly, I conclude that Bonita and Hansen Bros., for all times material to this case, have not been proven to be joint employers.

At page 33 of her brief, the General Counsel contends in the alternative, that even if I do not find a joint employer relationship between Respondents, the evidence supports a finding that Respondents individually engaged in conduct proscribed by the Act. This argument faces a threshold barrier which cannot be overcome: it is outside the scope of the complaint. The General Counsel recognized as much in an end of the case colloquy with the judge:

> J. Stevenson: So you would contend that if I were to not find a joint employer status, I, of necessity, would not be able to find a refusal to hire for union related reasons then, is that right?
>
> Ms. Walker-McBride: I think that's true.
>
> [Tr. p. 702]

Regrettably, the General Counsel does not address her change of position in the brief, nor the apparent legal issues raised.[7] Because the General Counsel alternative position will not change the end result in this case, I will consider it on its merits.

3. Alleged unlawful refusal to hire

As already mentioned, the General Counsel alleges in the complaint that Respondents unlawfully refused to hire six employees. Also as noted above, five of the six testified as the General Counsel's witnesses. Before considering their testimony, I recite some familiar legal principles. The elements of a refusal to hire case are contained in *Big E's Foodland, Inc.*, 242 NLRB 963, 968 (1993):

> Essentially, the elements of a discriminatory refusal to hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

See also *J. M. Merit Constructors*, 302 NLRB 301, 303–304 (1991).

I begin by questioning the bona-fides of the alleged discriminatees in this case. In general, applicants as potential employees are accorded the protection of the Act. *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 638 (1st Cir. 1982). Even applicants, so-called "salts," whose primary objective is to organize their fellow employees after they are hired onto a job, are considered employees and entitled to the protection of the Act. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). Yet, this case presents a different issue: the applicants' offer to work represented by their applications and interviews was conditional. They would work if and only if the employer signed a project agreement. Since under the facts and circumstances of this case, neither nonparty Dalsem, nor Bonita nor Hansen Bros. were legally required to sign a project agreement, the applicants' undisclosed condition precedent renders their status as bona-fide applicants for employment suspect. *O'Daniel Trucking Co.*, 313 NLRB 18 fn. 1 (1993). Compare *D.S.E. Concrete Forms, Inc.*, 303 NLRB 890 fn. 2 (1991). For this reason, I therefore recommend that this segment of the case be dismissed.[8]

Assuming in the alternative, that the applicants were bona-fide, I will also recommend dismissal, using the Board's *Wright Line* analysis.[9]

I find that each of the discriminatees who testified was known by Helderman and Renfro to be a union supporter or

[4] Tunks hired a welder named Ray Nevins to work on phase 3. Nevins was the only witness to testify for Respondent. Nevins claimed to have been a union man when he was hired by Tunks in the spring. However, sometime before he was hired, Nevins had stopped paying union dues. I find his probative value to Respondents' case limited—very limited.

[5] In her argument regarding joint employer status, the General Counsel devotes only a small portion to Tunks (Br., 25). I note that the General Counsel could have called Tunks as a witness, much as she called all or most of Respondents' officials as her witnesses.

[6] I also find it inappropriate to draw an adverse inference relative to Bonsang, a rather mysterious character in the case. There is no evidence, merely because he was a subcontractor on the project to consider him favorably disposed toward Hansen Bros.

[7] I see three potential issues here:

(1) Does the complaint bar the General Counsel from taking the alternative position she does in the brief?

(2) Was the alternative position argued by the General Counsel in its brief fully litigated?

(3) Finally, do the General Counsel's remarks to me raise a question whether Respondents may have been misled to its prejudice as to what the General Counsel's position was?

[8] There is no issue in this case regarding union salts. Compare *M. J. Mechanical Services, Inc.*, 324 NLRB 815 (1997).

[9] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Manno Electric, Inc.*, 321 NLRB 278 (1996).

sympathizer, and that these two interviewers were agents of Bonita whose knowledge is imputed to Respondent. After the interviews, Casey was sent a letter offering him a position:

> November 10, 1995
>
> Jay Casey
> 4735 W. Mars St. #2
> Tucson, AZ 85741
>
> Dear Jay:
>
> We are happy to inform you that after an extensive review of your application and interview with Bonita Nurseries we would like to offer you a position in our upcoming project. As you know, we are constructing a state of the art 20 acre Greenhouse utilizing the latest technology in construction, irrigation and heating transfer. This project promises to be challenging as well as rewarding.
>
> Please call Nick Halderman, the general manager at Bonita Nurseries at 520–384–4621 as soon as possible for specific information regarding the job.
>
> We are looking forward to working with you.
>
> Sincerely,
>
> /s/ Johan van den Berg
> Johan van den Berg
> [G.C. Exh. 5][10]

The other alleged discriminatees, received similar letters offering them positions. Slatzer, who retired about the time the project was getting underway claimed that he never received an offer of employment. But the General Counsel does not dispute that Slatzer, too, was offered a position, just like the others (br. 10 and 11 fn. 5).

After Bonita contracted with Hansen, the commencement of the project having been delayed due to the visa and licensing problems recited above, and none of the alleged discriminatees having contacted Bonita pursuant to G.C. Exh. 5, Bonita sent out another letter to Wayne Bryant which reads as follows:

> March 28, 1996
>
> Wayne Bryant
> 9421 N. Raleigh Pl.
> Tucson, Arizona 85737
>
> Dear Mr. Bryant:
>
> We are writing to inform you of the status of Bonita Nurseries' 20-acre expansion project in Bonita, Arizona. Since our initial contact with in October of 1995, plans for construction have changed significantly.
>
> Unfortunately, Bonita Nurseries' original plan to hire you in conjunction with specialists associated with the greenhouse manufacturing company did not come through. As a result, Bonita Nurseries has contracted with a general contractor for the construction of the 20-acre greenhouse. Construction personnel will be hired at the discretion of the contractor.
>
> Again, thank you for your interest in working at Bonita Nurseries. We will keep your name on file should we need additional help in your expertise.
>
> Sincerely,
>
> /s/ Nic Helderman
> Nic Helderman
> General Manager
> [R. Exh. 25.][11]

Upon receipt of this letter, which was identical to a letter sent to some other job applicants, Bryant never advised any of the alleged discriminatees about its contents, because the information was of no use to Bryant, even though he was an official of the Union (Tr. 564). Sometime shortly before or after receipt of the letter, Bryant learned that the new general contractor was Hansen Bros. and that it would be hiring workers (Tr. 564).

To recapitulate, I find that Bonita had good and sufficient reasons for withdrawing the offers of employment tendered to the alleged discriminatees in this case. That is Hansen Bros. was the general contractor and specifically reserved for itself the right to hire its own employees. No alleged discriminatee ever applied to Hansen Bros. even though Bryant was advised of the role of Hansen Bros. in phase 3. I find that the General Counsel has failed to establish a prima facie case under *Wright Line* and if it did, Respondents have rebutted the prima facie case with credible evidence.[12] For all reasons stated herein, I will recommend that this case be dismissed.

CONCLUSIONS OF LAW

1. Respondents are employers within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondents have not engaged in the unfair labor practice alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

It is ordered that the complaint is dismissed in its entirety.

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[10] Casey claimed that he attempted to reach Helderman by phone for two days during normal hours, but there was never any answer. I don't believe this testimony, because there is no reason to believe that Bonita would not be answering its phone at a time when a multi-million dollar project is in progress.

[11] Bryant is not alleged to be a discriminatee, and it is not clear whether he applied for work on phase 3. The point of the letter is to give notice to Bryant and to the Union that all union members would need to reapply with Hansen Bros. If those employees offered positions by Bonita had been automatically carried over to Hansen, this would have lent support to the General Counsel's joint employer theory.

[12] Among the other differences between the instant case and many others where the violation has been found, is the lack of 8(a)(1) findings or any other evidence from which illicit motive could be drawn. Indeed, I have searched the record as a whole (see *Casey Electric, Inc.*, 313 NLRB 774 (1994)) for any evidence to show animus and have found none.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.